BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDY L. MITCHELL	)	
Claimant	)	
	)	
VS.	)	
	)	
WAL-MART	)	
Respondent	)	Docket No. 1,014,315
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 6, 2004 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The ALJ found claimant "failed to prove by a preponderance of the evidence that he suffered an accidental injury arising out of and in the course of his employment with the respondent."[1] Accordingly, claimant's request for temporary total disability benefits and medical treatment was denied. The ALJ's Order is silent on the issue of notice, but he did find that claimant's date of accident was November 5, 2003.[2]

The claimant requests review of this determination and alleges that the evidence supports his claim for benefits. Claimant maintains he suffered an acute injury on November 5, 2003, but he continued to work each and every day thereafter until December 6, 2003, his last date of work. Based upon this evidence, claimant argues that

[1] ALJ Order (May 6, 2004) at 2.

[2] *Id.* at 1.

he has met his burden to establish that he sustained an injury on November 5, 2003 followed by a series of repetitive traumas up to his last date of work, and further that he provided timely notice of that injury.

Respondent asserts the ALJ's Order should be affirmed in all respects. Respondent contends claimant failed to provide proper notice of his November 5, 2003 alleged accident. Respondent further adds that the contemporaneous medical records do not corroborate claimant's alleged November 5, 2003 injury, and as such, contends the ALJ appropriately denied benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as the Dairy Department Manager for the Wal-Mart Supercenter in Ottawa, Kansas. On November 5, 2003, he was required to unload a large truck full of product that needed to be unpacked and placed on the store's display shelves within the dairy department. Claimant used a manual pallet jack to unload the pallets and move them near the store shelves. As his shift continued, claimant began to notice low back pain mostly on the right side. He continued to work his normal shift but at the end of the day, he advised Shirley Falls, an hourly associate, that "unloading the trailers that day was killing his back".[3] Ms. Falls was an assistant in the receiving department and according to claimant, when no one else was in the receiving area, she was the person he considered to be in charge in the back room.[4]

The next day, November 6, 2003, claimant sought treatment from Dr. D. Spratt. Claimant told Dr. Spratt of his right hip and leg pain. According to Dr. Spratt's records, claimant relayed no specific work-related injury. Claimant testified that he told Dr. Spratt that he believed he injured himself while unloading a truck at work, but that the injury was not serious and that he would have his private insurance cover the cost of the treatment. According to claimant, this procedure is consistent with respondent's policy about non-serious work-related injuries. Claimant, who is part of the safety team at Wal-Mart, testified that by allowing employees to obtain treatment for minor injuries through their own health carrier it saves respondent money.[5] As a member of the safety team claimant relays this policy to other employees. Thus, claimant maintains he was only following respondent's policy when he sought treatment from Dr. Spratt. Likewise, claimant maintains that this explains the lack of any reference to the injury he sustained while in respondent's employ.

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[3] P.H. Trans. at 14.

[4] *Id.* at 13-14.

[5] *Id.* at 17.

The next day, November 7, 2003, claimant testified he notified Joni Goldsberry, the nighttime manager, of his injury. Respondent, through Ms. Goldsberry and Rayma Kaub, the personnel manager, denies any notice of any such injury. Ms. Goldsberry did have occasion to discipline claimant on December 6, 2003 about his failure to remove some outdated milk products from the cooler. During that conversation, claimant never complained of a work-related injury. He refused to sign the paperwork presented to him, clocked out and apparently left the premises, and has not worked for respondent since that date.

The ALJ reviewed the medical records offered by the parties and had the unique opportunity to hear the witnesses testify in person. Given the issues presented in this claim, credibility is key, and the Board will often defer to the ALJ's judgment in these instances.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.

The ALJ concluded the claimant had failed to meet his burden to prove that his alleged injury arose out of and in the course of his employment with respondent. In weighing the parties' respective positions, the ALJ noted the following:

> The claimant's version of the injury is not corroborated by other evidence, and is contradicted by other evidence. The claimant initially saw Dr. Spratt about the injury, but Dr. Spratt's records of November 6, 2003 and December 18, 2003 show that the claimant related no particular cause for his physical complaints. This is quite at odds with the claimant's now-specific testimony of when and how the injury occurred, and that he reported it to respondent's managers soon thereafter. The claimant accounted for this discrepancy by saying that he discussed the fact the injury was work-related with Dr. Spratt, but because it was felt to be a minor injury, Dr. Spratt agreed to put down no specific cause, so the claimant could turn it in to his personal health insurance. Yet, the claimant testified that he reported the work-related injury to manager, Joni Goldsberry, on November 7, 2003. It is hard to see why the claimant would have Dr. Spratt make a record of no work injury, so the claimant could avoid making a work injury claim, then the next day report a work injury to a manager.[7]

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[6] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[7] ALJ Order (May 6, 2004) at 2.

The Board agrees with the ALJ's analysis of the inconsistencies contained within the record and affirms the ALJ's finding that claimant has failed meet his evidentiary burden.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated May 6, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2004.

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BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director